the boundary of an inland proprietor he becomes subject to loss by erosion, and has the right to gain by accretion. *Welles* v. *Bailey*, 55 Conn. 292; *Foster* v. *Wright*, 4 C. P. D. 438. The court in the principal case, though accepting the general principle of loss by erosion, holds that when the boundary to property is made fixed and definite, as it is in the case of property not originally riparian, it will not change with the movements of the shore line. This view finds support when at the time of the conveyance of the property an intention was clearly shown by the terms of the conveyance or the nature of the waters that riparian rights should be withheld from the land. *Cook* v. *McClure*, 58 N. Y. 437; *Gilbert* v. *Eldridge*, 47 Minn. 210, 49 N. W. 679. There was no such intention in the principal case and it is submitted that the opposite result would be preferable.

WATERS AND WATERCOURSES — PERCOLATING AND SURFACE WATERS — EXTENT OF RIGHTS. — The plaintiff collected artesian, spring, and seepage water from his land into a pond. In conveying this water by ditches to different parts of the land considerable quantities percolated through the soil. This artificially created percolating water was conveyed into a ditch running along a right of way belonging to the defendant, who used the water for irrigating purposes for nine years. *Held*, that the defendant acquired no right to the water. *Garns* v. *Rollins*, 125 Pac. 867 (Utah).

According to the English rule, a landowner can acquire no rights in the flow of percolating waters from other lands to his own, since the owner of the soil to whom they belong may dispose of them as he pleases. *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Frazier* v. *Brown*, 12 Oh. St. 294. The lower court in the principal case, proceeding on the erroneous ground that the waters in question were natural percolating waters, refused to apply the English doctrine. Instead, the reasonable use doctrine, adopted by a majority of American courts, was followed, giving an adjoining landowner a vested right in the flow of such percolating waters as are not necessary to the reasonable use of another's land. *Katz* v. *Walkinshaw*, 141 Cal. 116, 74 Pac. 766; *Smith* v. *City of Brooklyn*, 18 N. Y. App. Div. 340, 46 N. Y. Supp. 141. See 16 HARV. L. REV. 295. The water in question, however, was not naturally percolating, but merely surface or waste water; and on this ground the upper court in accordance with all past authority held that an adjoining landowner could acquire no rights in its flow from the land of another. *Broadbent* v. *Ramsbotham*, 11 Exch. 602. See *Frazier* v. *Brown*, *supra*, 300. It is submitted that the argument of social utility, which was mainly responsible for the introduction of the reasonable use doctrine as to percolating waters, is equally applicable to surface waters. See 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 59.

BOOK REVIEWS.

THE UNDERLYING PRINCIPLES OF MODERN LEGISLATION. By W. Jethro Brown. London: John Murray. 1912. pp. xx, 331.

Dr. Brown has essayed in his latest book a social philosophical theory of law and of law-making. Apart from his method of accomplishing the task, his undertaking it at all is an event of capital importance, since it evidently marks the swinging into line of English jurists in the general movement toward philosophical jurisprudence. But his method has significance also. On the Continent, the return to a philosophy of law came by way of reaction from the historical school, and yet chiefly from a development of that school. Kohler's

school of Neo-Hegelian jurists build upon what is sound in the historical method. In the same way in France, while the recent so-called "revival of natural law" represents a reaction from the historical school, it got its decisive impetus from adherents of that school rather than from the remnant of the metaphysical school of the nineteenth century. Dr. Brown began in jurisprudence as a Neo-Austinian. Accordingly his philosophical jurisprudence is both a reaction from the analytical school and a building upon it, and thus promises a new type of philosophy of law of a truly indigenous character, instead of the usual borrowing or adaptation from continental Europe.

Beginning with a statement of the "challenge of anarchy," of the anarchist position that "the best social order is one where men live their lives, not under the compulsory regulation of the state, but in voluntary coöperation," and an examination of the anarchist's objections to government, he points out that the whole movement of the modern world is away from anarchy and toward more and stronger government. What, then, he asks, are the principles of modern government? What is the ideal of modern law-making? In answering these questions Dr. Brown's method is much akin to that of the Neo-Kantian jurists who seek to discover the ideal of an epoch and to derive their principles of criticism therefrom. He asserts "the dominating influence of a single ideal in the politics of the nineteenth century," and he finds in the movement for democratic institutions, the movement to secure the citizen from undue state interference, and the movement to "extend social and individual responsibility," three phases of a single movement toward a common goal; three phases of "a progressive realization of the nature of the goal toward which the national life is slowly traveling." As might be expected of one who had come under the influence of Lord Acton, that ideal is liberty, "sought at one time in a form of polity, at another time in the protection of the subject from the tyranny of political institutions, and at yet another time in various forms of state control."

In thus linking the modern movement in jurisprudence and legislation with the Benthamite individualism of the immediate past, the author has naturally run foul of two sorts of critics. The old style individualist cannot accept his conception of liberty, taking liberty to mean the maximum of individual self-assertion unrestrained by state or society. An example may be seen in Mr. Abbott's review of the book in 12 Columbia Law Review 477. The orthodox Anglo-American jurist, who still despises philosophy of law, for reasons that were perfectly valid when philosophy of law meant the metaphysical systems of the fore part of the last century, looks askance at the idealistic interpretation which finds a real unity of development underlying the change from *laissez faire* to social control. An example may be seen in the recent review of the book in 28 Law Quarterly Review 418. It is too late now to reason with the former. To the latter we may say, consider the applications of the method and observe whether, apart from the details of the author's execution of his task, these applications are not more fruitful than anything we have had in the past. Dicey's method of observation of the currents and cross currents of thought and their relation to legislation leads to the conclusion that if we can know what the young men of to-day think, we shall know what legislators and courts will enact and adjudicate a generation hence. What we ought to do in the present in legislation and adjudication is a profitless question. For what we shall do was determined long ago when our jural minds were formed. The revival of philosophical jurisprudence, with all the disregard of historical and geographical considerations of which some reviewers are complaining, is a wholesome and indeed a necessary reaction from such a mode of thought.

Nineteenth-century individualism identified justice with the maximum of individual self-assertion. Accordingly liberty required a minimum of interference with such self-assertion. For these ideas Dr. Brown substitutes self-

realization as the end, and promotion in whatever way of the maximum of self-realization as the means. In this way the ideas of the Benthamite individualists are not to be wholly rejected, they are rather to be curbed. They represent a stage in the development of the ideas of justice and liberty, not a set of ideas which have been completely superseded and have no more than a historical interest. Self-realization includes self-assertion, and therefore the attempt of the Benthamites to secure self-assertion was a legitimate undertaking, pressed to extravagant consequences because self-assertion was taken for the whole. This position is not very different from that taken by those pragmatists and sociologists who see in justice the satisfaction of the maximum of human demands at the least cost to other human demands. In any event individual self-assertion has a legitimate place in the scheme. Nor is the theory very different from the doctrine of liberty through society which so many sociologists have been preaching. Dr. Brown tells us that "the ideal of liberty has two aspects. It affirms from one point of view the duty of the state to regard each citizen as an end in himself; from another it affirms the right of the state to regard the citizen as a means to the general well-being." Accordingly he finds the two fundamental principles in "the worth of man and the unity of society."

British sociology has been slow to respond to the psychological movement. The author, however, if he has not read Ward, has read and made good use of Dr. Ross's "Social Control and Social Psychology." One could wish that he had devoted more attention to the German social philosophical jurists. One cannot but feel that the idealistic interpretation of jurisprudence and of the history of legislation, the finding of the end of law in liberty and much of the discussion of the idea of liberty, is too much in the vein of the metaphysical jurisprudence of the last century. But the task of the social philosophical jurist who writes in English at present is a hard one, and much may be forgiven a pioneer whose work is as well done as Dr. Brown's work in this book.

Unhappily there is no index, a defect which we have come to accept with resignation in German and French books, but which is an unacceptable innovation in an English book. R. P.

A SHORT HISTORY OF ENGLISH LAW. From the Earliest Times to the end of the Year 1911. By Edward Jenks. Boston: Little, Brown, and Company. 1912. pp. xxxviii, 390.

A history of the whole of English law in less than four hundred pages for the average student whose time is limited is the task which Mr. Jenks has set for himself and has skilfully performed. To state in readable form with some attempt at completeness the development of our law from the Anglo-Saxon dooms to the year 1911 requires at least a winning style, a clear head, and a sense of historical perspective. The author's reputation in these respects has been sustained by this book. We regret, however, the self-imposed restriction in his discussion of the origin and development of the courts. This is partly the cause of his devoting only sixty-seven pages to legal history down to 1272. Here, as elsewhere, he has shown us that he can think for himself; and, even if other writers have covered this period fully, it is a pity that we cannot have Mr. Jenks's full strength. From 1272 to modern times, a period less authoritatively covered by others, we have about three hundred pages; and here again, after admiring the agreeable style, the clever articulation of subject matter, and the general accuracy, the feeling is one of regret at not having a complete scholarly work rather than a "modest, but comprehensive, manual." One asks oneself whether a sketchy account of such a great subject is really worth while.